

LIBRARY
SUPREME COURT U. S.

Office Supreme Court U. S.
FILED
JUN 22 1943
CHARLES ELMER JURY

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 960

11

TOM C. CLARK, Attorney General, as Successor to the
Alien Property Custodian,

Petitioner,

VS.

MANUFACTURERS TRUST COMPANY,

No. 43

15

MANUFACTURERS TRUST COMPANY,

Petitioner,

VS.

TOM C. CLARK, Attorney General, as Successor to the
Alien Property Custodian,

MEMORANDUM IN OPPOSITION TO THE ATTORNEY
GENERAL'S MOTION FOR LEAVE TO FILE PETITION
FOR REHEARING OF ORDER DENYING HIS PETI-
TION FOR WRIT OF CERTIORARI AND MOTION BY
MANUFACTURERS TRUST COMPANY FOR LEAVE TO
FILE PETITION FOR REHEARING OF AN ORDER
DENYING ITS PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE SECOND
CIRCUIT

LESTER E. DENONN,

Counsel for Respondent and Petitioner,

29 Broadway,

New York, N. Y.

HENRY LANBAU,

of Counsel,

IN THE
Supreme Court of the United States
OCTOBER TERM, 1948.

No. 386.

TOM C. CLARK, Attorney General, as Successor to the
Alien Property Custodian,
Petitioner,

vs.

MANUFACTURERS TRUST COMPANY.

No. 443.

MANUFACTURERS TRUST COMPANY,
Petitioner,

vs.

TOM C. CLARK, Attorney General, as Successor to the
Alien Property Custodian.

**MEMORANDUM IN OPPOSITION TO THE ATTORNEY
GENERAL'S MOTION FOR LEAVE TO FILE PETITION
FOR RE-HEARING OF ORDER DENYING HIS PETI-
TION FOR WRIT OF CERTIORARI AND MOTION BY
MANUFACTURERS TRUST COMPANY FOR LEAVE TO
FILE PETITION* FOR RE-HEARING OF AN ORDER
DENYING ITS PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE SECOND
CIRCUIT.**

Manufacturers Trust Company opposes the motion
of Tom C. Clark, Attorney General, as Successor
to the Alien Property Custodian, for re-hearing

of the order of this Court entered January 17, 1949 denying the Government's petition for certiorari upon the ground that there is no conflict between the decision of the Court of Appeals for the Second Circuit in this case and the decision of the Court of Appeals for the Third Circuit in *Clark v. E. J. Larimo & Co.* In the event that the Attorney General's petition for rehearing is granted, Manufacturers Trust Company respectfully urges for re-hearing of the order of this Court entered on January 17, 1949 denying its petition for writ of certiorari upon the ground that this Court cannot properly and fully determine the question raised by the Attorney General upon his petition for writ of certiorari without determining the substantial issues raised by the application of Manufacturers Trust Company for writ of certiorari.

MEMORANDUM IN OPPOSITION TO THE ATTORNEY GENERAL'S PETITION FOR RE HEARING.

There is no conflict between the decision of the Court of Appeals for the Second Circuit in this case and the decision of the Court of Appeals for the Third Circuit in *Clark v. E. J. Larimo & Co.*

These propositions are basic:

That the Trading with the Enemy Act makes no provision for penalty or interest upon non-compliance with the Alien Property Custodian's or the Attorney General's demand; that the award of interest is discretionary; that where the refusal to comply with the turnover directive and the correctness of the Custodian's determination is based upon unsubstantial grounds, interest may, in the discretion of the Court, be awarded to discourage vexatious and unreasonable

delay; but if there is a substantial dispute and the delay is based upon reasonable grounds, interest should not be awarded.

In the *Larino* case the non-compliance was not based on substantial or reasonable grounds, hence the award of interest was proper. In the instant case, the refusal was bottomed on meritorious grounds, hence the failure to award interest was a proper exercise of discretion.

While it is true that in this case and in the *Larino* case the refusal was based upon a claimed set off, the two cases are not otherwise analogous.

In the *Larino* case, the claimed set off was based on a claim for unliquidated damages which obviously could only be established by subsequent litigation. There was no present indebtedness of the enemy in a sum certain which could be set off by *Larino* against its present indebtedness to the enemy, therefore, the refusal to comply with the Attorney General's demand was clearly unreasonable.

In this case, Manufacturers Trust Company's asserted set-off was predicated on a fixed indebtedness in a sum certain which was absolutely due prior to the issuance of the vesting order.

Furthermore, in the *Larino* case, the respondent asserted only a procedural set-off which clearly was not available under Section 17 of the Trading with the Enemy Act.

Manufacturers Trust Company contended that the existence of a debt could not be determined from the status of any one account, but must be determined from the status of all the accounts between itself and the enemy. In short, Manufacturers Trust Company

was asserting a substantive right of set-off, based on the "familiar bankers' lien. In so doing, Manufacturers Trust Company thought its position found ample justification in precedents such as *Stimpert v. Miller*, 298 Fed. 520.

The fact that the Court of Appeals for the Second Circuit directed Manufacturers Trust Company to comply with the Custodian's demand does not imply that Manufacturers Trust Company's refusal to comply with the demand in the first instance was unreasonable. There was a substantial dispute between Manufacturers Trust Company and the Attorney General and its actions were not dilatory. The decision of the Court of Appeals for the Second Circuit merely holds that in such circumstances it is proper to deny interest.

**PETITION FOR RE HEARING OF THE ORDER DENYING
MANUFACTURERS TRUST COMPANY'S PETITION FOR
WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT—**

In the event that the Attorney General's petition for re-hearing of the order denying his petition for writ of certiorari is granted, this Court will perforce have to pass upon the nature of the dispute between Manufacturers Trust Company and the Attorney General. In view of the foregoing, Manufacturers Trust Company respectfully prays that its petition for re-hearing of the order of this Court denying its petition for writ of certiorari in this case be granted.

The decision of the Court of Appeals for the Second Circuit is in conflict with the well-established principle that a bank's right of set-off is a matter of substantive right and that the bank may at any time apply a deposit balance due from the bank to the depositor in

payment of a past due obligation of a depositor. The question presented by Manufacturers Trust Company's petition for writ of certiorari is of great importance to banks throughout the country. Presumably, the Attorney General will not object to the granting of Manufacturers Trust Company's petition for writ of certiorari. In his memorandum submitted in opposition to Manufacturers Trust Company's original petition for writ of certiorari, the Attorney General stated that it would be appropriate for this Court to review the broad question of the Custodian's power to require the payment to himself of sums of money which he determines to be owed.

Wherefore, Manufacturers Trust Company respectfully prays that the Attorney General's petition for re-hearing should be denied, and in the event that it is granted, that its petition for re-hearing should likewise be granted.

June 1949

Respectfully submitted,

MANUFACTURERS TRUST COMPANY,
Respondent

By LESLIE E. DENON,
Counsel for Respondent and
Petitioner.

Certificate of Counsel.

I, **LESTER E. DENSON**, Counsel for Respondent, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

LESTER E. DENSON,

Counsel for Respondent and
Petitioner.